

the words "on such terms as to the payment of interest as it thinks fit." That is a different question from the one with which we are now dealing.

1307

GOKALDAS
v.
GOVIND.

The result is that the decree must be confirmed with costs.

Decree confirmed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Heaton.

BAI HIRAKORE, WIDOW OF THAKARDAS JECHAND (ORIGINAL DEFENDANT), APPELLANT, v. TRIKAMDAS HIRACHAND (ORIGINAL PLAINTIFF), RESPONDENT.* 1907
November 13.

Partition Act (IV of 1893), section 2—Decree for partition—Partition of a house in two divisions—The mode of division found inexpedient in execution of the decree—Power of Court to order sale of the house and to divide the sale-proceeds.

A decree for partition of a house ordered its division into two equal moieties. In execution of the decree this mode of division was found inexpedient, and the Court, therefore, ordered the house to be sold and the sale-proceeds to be equally divided between the parties under section 2 of the Partition Act (IV of 1893). On appeal—

Held, that the order was right, for section 2 of the Partition Act (IV of 1893) applies, not only where the Court has to pass a decree in a suit for partition, but also where, after the Court has passed such a decree directing the partition to be effected in a particular mode, it is found that that mode is impracticable or inexpedient and one of the parties asks the Court to modify the decree by passing an order under this section.

Kadir Bacha Saheb v. Abdul Rahiman Saheb (1) and *Hiramoni Dassi v. Radha Churn Kar* (2) followed.

SECOND appeal from the decision of Dayaram Gidumal, District Judge of Surat, confirming the order passed by J. E. Modi, First Class Subordinate Judge of Surat.

Proceedings in execution.

* Second Appeal No. 681 of 1906.

(1) (1901) 24 Mad. 639.

(2) I (899) 5 Cal. W. N., 128.

1907

BAI HIRA-
KORE
v.
TRIKAMDAS.

A decree in a suit for partition ordered "the plaintiff do recover possession of a moiety of the house in dispute."

In execution of this decree the Subordinate Judge, having found that each portion of the house would be rendered uninhabitable if it were divided into two parts, ordered under section 2 of the Partition Act (IV of 1893) that the house be put up to auction sale and the proceeds divided equally between the parties.

On appeal this order was confirmed by the District Judge.

The defendant appealed to the High Court.

Lallubhai A. Shah, for the appellant :—Section 2 of the Partition Act cannot be applied to cases where a final decree of partition is passed. It can only be applied by the Court before passing the final decree and in execution proceedings the Court should not go behind the terms of the decree in execution.

Manubhai Nanubhai for the respondent referred to *Kadir Bacha Saheb v. Abdul Rahiman Saheb*⁽¹⁾ and *Hiramoni Dassi v. Radha Churn Kar*⁽²⁾.

CHANDAVARKAR, J. :—It is contended in support of this appeal that section 2 of the Partition Act (IV of 1893) applies only where a Court has to pass a decree in a suit for partition, but not where, after the Court has passed such a decree directing the partition to be effected in a particular mode, it is found that that mode is impracticable or inexpedient and one of the parties asks the Court to modify the decree by passing an order under this section.

In the first place it is quite clear from certain provisions of the Act that the Legislature intended the provisions to apply in both cases. The language of section 2 is wide enough to cover them both.

That an order in execution directing a sale of the property in the manner pointed out in section 2 falls within that section is clear from section 8, which treats such an order as a decree within the meaning of section 2 of the Code of Civil Procedure. That is, but for section 8 such an order might not have been a decree in the strict sense of the term. It was not necessary to

(1) (1901) 24 Mad. 630.

(2) (1899) 5 Cal. W. N., 128.

make it a decree by means of section 8, if section 2 was intended not to apply to but to exclude such orders. An order directing a sale in the manner prescribed in section 2 is superfluous, if the decree passed in the suit has itself directed such a sale. It is only where the decree gives no such direction that the necessity can arise for an order for sale in execution under section 2. Hence the Legislature provide by section 8 that such an order must be treated as a decree. And that again is made more clear still by section 7, clause (b), which provides that, when any property is directed to be sold under this Act under a decree or order, the procedure to be followed shall be that prescribed by the rules of this Court, if any, and, until such rules are made, by the procedure prescribed in the Code of Civil Procedure in respect of sales in execution of decrees.

It is contended, however, that we should not adopt this construction, because it is opposed to the principle of law that a decree must be executed as it stands and its terms should not be varied. The answer to that is that, in a decree for partition, the right of each party to obtain a share by partition declared by the decree, is the primary thing; the mode in which that share is to be carved out and allotted is only subsidiary. If that mode becomes impracticable or inexpedient or detrimental to the interests of any party, the Court is given jurisdiction by the Partition Act to adopt any of the modes prescribed therein.

The conclusion we have arrived at is supported by the authorities which have been cited by the learned pleader for the respondent: See *Kadir Bacha Saheb v. Abdul Rahiman Saheb*⁽¹⁾ and *Hiramoni Dassi v. Radha Churn Kar*⁽²⁾.

Then it is contended that, as here there was an order under section 396 of the Civil Procedure Code, the Court could not go behind it. The answer to that is that, if the Partition Act applies, the proceedings taken already under section 396 are no bar to the application. We must for these reasons confirm the decree with costs.

Decree confirmed.

R. R.

(1) (1901) 24 Mad. 639.

(2) (1899) 5 Cal. W. N. 128.